INDEX

CITATIONS

Cases:

Statute:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 597

SHEPARD NILES CRANE & HOIST CORPORATION, PETITIONER

v.

WILLIAM R. MCCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Western District of New York (R. 143-164) is reported at 72 F. Supp. 239. The opinion of the Court of Appeals for the Second Circuit (R. 199-206) is reported at 171 F. 2d 69.

JURISDICTION

The judgment of the United State Court of Appeals for the Second Circuit was entered Decem-

ber 1, 1948 (R. 206). The petition for certiorari was filed on February 25, 1949. Petitioner apparently intended by reference to "Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925" (repealed by c. 646 Sec. 39, 62 Stat. 992, effective September 1, 1948) to invoke the jurisdiction of this Court under Title 28, United States Code, section 1254 (1).

QUESTION PRESENTED

Whether so-called "bonus" payments based on the employees' hourly rates of pay, and paid at regularly recurring intervals over a period of several years "as additional compensation for services rendered," should be regarded as part of the "regular rate" within the meaning of Section 7(a) of the Fair Labor Standards Act.

STATUTE INVOLVED

Section 7(a) of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U.S.C. 201) provides that

> No employer shall * * * employ any of his employees who is engaged in commerce or in the production of goods for commerce—
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> * * * * *
>
> (3) for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

This action was instituted in October 1945 by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 17 of the Fair Labor Standards Act to restrain petitioner from violating the overtime and shipment provisions of the Act (R. 2-5). The material facts were stipulated (R. 10-35) and are substantially undisputed. On the basis of the complaint, answer, and stipulation of facts, the Administrator moved for summary judgment (R. 8-9). In addition to the stipulation of facts, the record includes affidavits of six employees and two company officers filed by the employer in opposition to the motion for summary judgment. (R. 37 *ff*).

It was stipulated that the employees who receive the "bonuses" herein discussed are "engaged in the production of goods for commerce and are subject to the provisions of the Fair Labor Standards Act" (R. 11).

During the three and one-half years from the beginning of 1942 until suit was filed in 1945, petitioner made bonus payments at regular three month intervals to its hourly rate employees.[1] These bonus

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[1] The dates were:

April 2, July 2, October 1, and December 17, 1942,
April 1, July 1, September 30, and December 16, 1943,
March 30, June 29, September 28, and December 21, 1944,
March 29, and June 28, 1945.

For the two years 1940 and 1941 the payments averaged one each 3 months (8 for the 24 month period, two in 1940 and six in 1941) (R. 11-21).

payments were in addition to other hourly and incentive earnings of the employees (R. 24). Generally, each followed a resolution of petitioner's board of directors near the end of the bonus period, making provision for payments "as additional compensation for services rendered" (R. 11-15).[2] The bonus payment for each employee has always been calculated from his basic hourly rate of pay. The amount paid individual employees in each basic hourly rate group has remained unchanged since July 1942 except that from and after December 1944 it was reduced twenty percent.[3]

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[2] That the vote of the board of directors was merely a matter of form, and not actually prerequisite to distribution of each installment of the bonus, is illustrated by the fact that such payment was made by the general manager without prior board approval in July 1941. Approval was voted by the board sometime in August. Furthermore, provision for such payment by resolution of the board was not always subsequent to the work for which it was intended as compensation. The October 1941 payment was voted in August of that year, prior to the bonus period, along with the July and August payments. (R. 15, 40-41).

[3] That the bonus was not constantly changing in amount or based on arbitrary classifications of employees (as petitioner's statement may imply) but was stable in nature and calculated from the basic hourly rate, is apparent from the fact that the formula and amounts of individual quarterly bonuses since July 1942 have been as follows (R. 17-21):

Basic hourly rate	Bonus	
	July 1942 to December 1944	Since December 1944
40¢ an hour or less	$ 40.00	$ 32.00
41¢ an hour to 45¢	45.00	36.00
46¢ an hour to 50¢	50.00	40.00
51¢ an hour to 55¢	55.00	44.00
56¢ an hour to 60¢	60.00	48.00
61¢ an hour to 65¢	65.00	52.00
66¢ an hour to 70¢	70.00	56.00

The petitioner always deducted social security taxes from the bonus payments and included them as "Salary and Wages" in its income tax returns, and also included them in computing the premium on the workmen's compensation insurance. Likewise, it included them in victory and withholding tax deductions. (R. 24.)

The petitioner did not, however, include the bonus payments in computing the regular rate of pay under the Fair Labor Standards Act (R. 22).

In August 1943, the petitioner applied to the National War Labor Board, requesting "Approval for *Continuance* of Bonus *Plan*" (R. 26). [Italics supplied.] Although its president and general manager now avers that the bonuses "were not paid to make up cost of living increases" (R. 42), the application to the War Labor Board referred to the increased bonus distribution made on April 2, 1942, as being attributable "principally to the increased cost of living" and stated, "We wish to continue these bonuses at the amounts which were paid on October 1 and December 17 as we do not wish to *decrease the pay* of these employees at the present time" (R. 26). [Italics supplied.] It was intimated in the letter that a diminution or cessa-

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71¢ an hour to 75¢	75.00	60.00
76¢ an hour to 80¢	80.00	64.00
81¢ an hour to 85¢	85.00	68.00
86¢ an hour to 90¢	90.00	72.00
91¢ an hour to 95¢	95.00	76.00
96¢ an hour and above	100.00	80.00

tion of these payments might result in "labor trouble" (R. 27).

Just prior to an election held in December 1943 for the purpose of determining the collective bargaining agent under the National Labor Relations Act, petitioner sent a letter (R. 32-34) to each of its employees, together with a pay-roll slip (R. 34) indicating the total payments from the company to the individual employee during the first nine months of 1943. This total included all the hourly earnings and all bonuses paid to the employee (R. 23, 34). At the same time the employee was also advised of his average weekly earnings, and the company included the bonuses here in question in making that computation (*ibid*).

It was stipulated that "some of the employees" would testify that during the period when the bonus payments were made, "they expected to continue to receive these bonus payments and assumed that they would continue to be made" (R. 23). This expectation of receiving the bonuses and the assumption that they would continue to be paid were predicated on the fact that at recurrent intervals over a substantial period of time the company had made the bonus payments (R. 23). This expectation was uncontradicted, though a possible difference of opinion among the employees on another point seems apparent from the further stipulation in the record that some of them "regarded these bonus payments

as an integral part of the total earnings received for the work performed for the defendant" (R. 23), and the affidavits of six employees filed by petitioner, subsequent to the stipulation, in opposition to the motion for summary judgment, each stating, in identical language that the affiant considered the bonuses "to be gifts from the Company and not part of the regular wages * * *" (R. 44-49). Although the bonus had been paid quarterly or more frequently since August 1940, the bonus payments in 1944 and 1945 were accompanied by a card stating that the bonus was paid "in appreciation of your earnest cooperation and with the desire to reward deserving employees" and that the management hoped it "will be able to pay more prosperity bonuses in the future," but that future bonuses "are always uncertain since they have to depend on profits and other business factors * * *" (R. 23, 35). No such notice was sent with the payments made in the preceding years.

In an affidavit, filed subsequent to the stipulation of facts, in opposition to the motion for summary judgment, defendant's president and general manager stated that the bonuses "were paid as an exercise of arbitrary discretion on the part of the Board which would in each case decide to reward the employees in any amount it felt was reasonable at that particular moment" (R. 41).

The district court denied the Administrator's motion for summary judgment and ordered the

complaint dismissed (R. 165), ruling that the payments were not part of the employees' regular rates of compensation (R. 143-164).

The Court of Appeals reversed (R. 205-206), on the ground that this case was in substance indistinguishable from *Walling* v. *Richmond Screw Anchor Co.*, 154 F. 2d 780 (C. A. 2), certiorari denied, 328 U. S. 870, and *Walling* v. *Garlock Packing Co.*, 159 F. 2d 44 (C. A. 2), certiorari denied, 331 U. S. 820, in both of which it had held that payment of bonuses at regularly recurrent intervals constituted part of the "regular rate" under the principles established by this Court's decisions in *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427; *Walling* v. *Youngerman-Reynolds*, 325 U. S. 419; and *Walling* v. *Helmerich & Payne*, 323 U. S. 37 (see 154 F. 2d at 784, and 159 F. 2d at 45). The fact that a "plan" had been expressly announced to employees in advance in the *Richmond Co.* and *Garlock Co.* cases, said the court, presented "no tenable distinction," inasmuch as in those cases, as in the instant case, the employer reserved the right to deny the "bonus" at any time (R. 203-205):

> * * * in either event the expectation and reliance of the employee would be the same. * * *
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> * * * we can see no distinction between a "plan" capable of withdrawal at any time and an arrangement which the employee had every

> reason to suppose would be continued in the absence of some change of circumstances. * * *
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> * * * * *
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> * * * The expectation of the latter, based upon payment of bonuses at regular intervals, would seem to be no different, particularly where as here the company had notified its employees of the amount of bonus payments made to them during a long period and expressed the hope that "they would be able to pay more prosperity bonuses in the future."

The "crucial fact," as stated by the Second Circuit in its *Richmond* and *Garlock* opinions, on which the instant decision was based (R. 202), is that the bonus payments were regularly made over a substantial period of time. *Richmond* opinion, 154 F. 2d at 784; *Garlock* opinion, 159 F. 2d at 45.

ARGUMENT

The decision below correctly applies the principles now well established by this Court's decisions interpreting the overtime provisions of the Act. Although there is an apparent conflict in result between the decision below and that of the Eighth Circuit in *Walling* v. *Frank Adam Electric Co.*, 163 F. 2d 277, the conflict appears to be simply in the appraisal of evidentiary details rather than over any principle of general importance in the enforcement of the Act. We do not believe that the conflict is of such a character or of sufficient importance to require review by this Court.

1. The decision below is clearly a correct application of principles now well settled by the decisions of this Court interpreting the overtime requirements of the Act. *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427; *Walling* v. *Helmerich & Payne*, 323 U. S. 37; *Walling* v. *Youngerman-Reynolds*, 325 U. S. 419; *Bay Ridge Operating Co.* v. *Aaron*, 334 U. S. 446. In the *Bay Ridge* case, this Court's most recent opinion on the subject, "regular rate" was defined as "Total compensation for hours worked during any workweek less overtime premium divided by total number of hours worked" (334 U. S. at 450, fn. 3). As there is no contention that the bonus here is an overtime premium, the sole question is whether it constituted "compensation for hours worked." Petitioner's board of directors itself has provided the answer to this question, for all of its resolutions authorizing an installment of the bonus expressly provided that the bonus was "additional compensation for services rendered" (R. 12-21). The earlier decisions of this Court, cited *supra*, also established that compensation to employees in the form of regularly paid bonuses in addition to their regular basic hourly pay is "a normal and regular part of their income" and must be reflected in the regular rate. *Walling* v. *Harnischfeger Corp., supra*, 325 U.S. at 430, 432; *Walling* v. *Helmerich & Payne, supra; Walling* v. *Youngerman-Reynolds, supra.*

Neither the form of the compensation as a wage premium or bonus, nor the manner in which the bonus is computed, alters the decisive fact that it is regularly paid for non-overtime work. Bonus payments made at regularly recurring intervals consistently have been held to constitute a part of the regular rate, whether in the form of a piece work incentive bonus (*Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, 431; *Walling* v. *Stone*, 131 F. 2d 461 (C.A. 7)), a profit-sharing bonus (*Walling* v. *Wall Wire Products Co.*, 161 F. 2d 470 (C.A. 6), certiorari denied, 331 U. S. 828), a lump sum addition to base pay (*Carleton Screw Products Co.* v. *Walling*, 126 F. 2d 537 (C.A. 8), certiorari denied, 317 U. S. 634), or a predetermined percentage of base pay (*Walling* v. *Harnischfeger Corp.*, *supra* at 430; *Walling* v. *Richmond Screw Anchor Co.*, 154 F. 2d 780 (C.A. 2), certiorari denied, 328 U. S. 870). The decision below, therefore, is in accord with the decisions of this Court, as well as with virtually all of the decisions of the courts of appeals and the interpretation of the Administrator.[4]

2. While the Eighth Circuit in the *Frank Adam Electric Co.* case, reached a different (and we be-

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[4] By quoting only a portion of the Administrator's release, dated September 2, 1941, petitioner gives the impression that the bonuses in the instant case should be excluded from "regular rate" computations under the principles there stated (Pet. pp. 10, 11). The pertinent parts of the release are set forth in full as footnote 3 to the opinion of the Court of

lieve erroneous) result from the decision below, on apparently similar facts, there does not appear to be any difference of opinion between the two courts on the basic controlling principles. As noted above, the differing results reached in these two cases seem to have stemmed from the appraisal of evidentiary details rather than from any conflict with respect to the governing principles or their general application. This is illustrated in the distinction drawn by the court in the *Frank Adam Electric Co.* case between bonuses paid pursuant to a revocable plan expressly announced in advance and similar bonuses where the nature of the employer's obligation, if any, is identical, but the employee's expectation is caused by a history of regular payment instead of an express advance announcement. The court in the *Frank Adam Electric Co.* case, in appraising the evidence, attached significance to the fact that the bonus there was not provided for prior, but only "subsequent to the earning by the employee of any salary upon which it was based" (163 F. 2d at 279). The court below in the instant case on the other hand considered such differences to relate only to details of administration or of draftsmanship, which were outweighed by the similarity of these bonus payments for all practical purposes.

Since the application of the governing principles depends to some extent on the particular facts and

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Appeals and the reason why those principles require the inclusion of this bonus in regular rate computations is presented adequately in that opinion (R. 204-205).

evidence in each case, the different result reached in the two cases has not thus far given rise to any general enforcement problem and it is not anticipated that it will have any substantial general effect. It may be noted that the Administrator did not petition for certiorari in the *Frank Adam Electric Co.* case because of the seemingly limited implications and effect of that decision. It might also be observed that petitions for certiorari were denied in both the *Richmond* and *Garlock* cases, where the decisions were virtually the same as the decision below in the instant case. We do not believe that the situation has been so changed or that the holding below presents any new issue or problem of such importance as to justify the granting of this petition.[5]

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[5] Petitioner's comment (Pet. 14) that review here is needed because the legislative definition of "regular rate" suggested by the Administrator on June 11, 1948 is not part of any current proposed amendment to the Act, is incorrect. The pertinent provisions of that suggested amendment, which appeared in the Administrator's 1948 annual report to the Congress (p. 68), are included verbatim as Sections 7(d)(1) and (3) of H.R. 3190, which has now been reported favorably by the Committee on Education and Labor (81st Cong., 1st sess., H. Rep. No. 267). The proposed amendment would expressly include in the "regular rate" "all remuneration for employment" except for certain specified exclusions.

Contrary to the impression conveyed by the petitioner (Pet. p. 14), the proposed amendment would require the same result reached by the court of appeals here. The words deleted from the portion of the Administrator's proposal quoted by the petitioner, and which qualify the quoted words (Pet. p. 14), are: "payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service." See H. Rep. No. 267, 81st Cong., 1st sess., pp. 5, 47. As the payments here were made *regularly* rather than on *special* occasions, the exclusion from "regular rate" provided by the pro-

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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APRIL, 1949.

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posed amendment would be inapplicable. The section in the proposed bill which is more pertinent—Section 7(d)(3)(a)—removes any doubt about this. Section 7(d)(3)(a) would exclude "sums paid in recognition of services performed during a given period *if* either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and *not pursuant to any prior* contract, agreement, promise, *arrangement, or a custom or practice causing the employee to expect such payments regularly.*" (Italics added.) See H. Rep. No. 267, 81st Cong., 1st sess., pp. 5, 47. The italicized words make it clear that the payments here involved would not be excluded under this provision. None of the other specified exclusions in the proposed amendments could possibly have any application to such bonus payments as are here involved.

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